A Masterpiece at a Glance. Piero Calamandrei, Introduzione allo Studio Sistematico dei Provvedimenti Cautelari

A Masterpiece at a Glance: *Piero Calamandrei*, Introduzione allo Studio Sistematico dei Provvedimenti Cautelari, Padova, Cedam 1936

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1. The "Introduzione allo studio sistematico dei provvedimenti cautelari" ("Introduction to the Systematic Study of Provisional Measures") was published by *Piero Calamandrei* in 1936.

It normally takes a long time for a piece of legal scholarship to become a "classic", as its capacity to mark a turning point in a certain field of research can only be assessed after a lot of years. As far as *Calamandrei*'s masterpiece is concerned, a fully different story is to be told. The "Introduzione allo studio sistematico dei provvedimenti cautelari" was a classic from the outset, as its huge potential for influencing the course of research in the field of provisional measures could be assessed at first sight, as soon as the book came out from the print shop, simply comparing its table of contents with the previous (Italian and foreign) pieces of scholarship on this subject matter.

When *Calamandrei* published the "Introduzione" he was at the top of his career as a scholar in civil procedure. Sixteen years before (1920) he had published "La Cassazione civile", one of the best pieces of Italian legal scholarship, which made him well known in Italy and abroad, especially in Germany.[1] After WWII he continued to be productive in the field of civil procedure till his death in 1956, being among others the academic mentor of *Mauro Cappelletti*. Moreover he broadened further his spectrum to the field of constitutional law, after participating in the works of the Constituent Assembly (1946-47), charged with drafting the new Italian Constitution (1948).

2. As *Calamandrei* put it in the foreword, the "Introduzione allo studio sistematico dei provvedimenti cautelari" originates in a course given to third- and fourth-year students in the Faculty of Law at the University of Florence. The high level and close link between teaching and researching is the first key aspect of *Calamandrei*'s book.

The second key point is the capacity of giving the essentials: The "Introduzione" is 162 pages long.

3. *Calamandrei*'s work leaves behind previous surveys focused on single provisional measures, as sequestration, *operis novi nunciatio*, and so forth, with a view to framing a general theory of provisional measures, which is both arrangement of the current state of affairs and prediction of future developments.

Indeed, in the final pages of his book *Calamandrei* lays down a kind of work program for the lawgiver, which was implemented in the course of the following decades.

In particular, if there is a danger of imminent and irreparable injury and no specific provisional measure is available, *Calamandrei* suggests that the courts shall be allowed to grant urgent measures which are, under the circumstances, most appropriate to ensure the effects of the decision on the merits of the case.

[1] Cf. *E. Schwinge*, Grundlagen des Revisionsrechts. Rechtsdogmatisch rechtsvergleichend rechtspolitisch, Bonn, 1935.

This proposal was implemented in the current Code of Civil Procedure (c.p.c.), enacted in 1942, through the Art. 700 c.p.c. (*provvedimenti d'urgenza*). One can imagine that such broad purpose and scope make the urgent relief under Art. 700 c.p.c. a key asset in the Italian machinery of justice for achieving the effectiveness of judicial protection of rights.

Furthermore, *Calamandrei* proposes to lay down unified summary proceedings to decide upon requests for provisional measures, with a view to striking a balance between the effective interim protection of plaintiff's rights and the defendant's right to be heard. This proposal was implemented only in the 1990 Reform Act.[2]

4. The most important achievement of *Calamandrei*'s study lies in understanding provisional measures as means of ensuring the effectiveness of a "main" measure, (IT *provvedimento principale*, DE, so to speak, *Hauptverfügung*), be it a judgment on the merits, be it an enforcement measure.

He argues therefore that provisional measures are not of necessity ancillary to the following enforcement of judgments, criticizing the solutions of certain codes of civil procedure, like the German *Zivilprozessordung*, where legal provisions about *Arrest* and *einstweilige Verfügung* are part of the Eighth Book on enforcement of judgments.

He called such a link between provisional and main measure "instrumentality"(IT *strumentalità)* of provisional measures.

Moreover, Calamandrei undertakes an in-depth analysis of the danger of suffering a serious or even irreparable harm during the time necessary for the ordinary proceedings to be carried out, which triggers the plaintiff's need to ask for provisional measures. This is the so called *periculum in mora* in the *Calamandrei*'s terminology, the *Verfügungsgrund* in the German terminology relating to the *einstweiliger Rechtsschutz*, the *cas d'urgence* in the French terminology relating to the *référé.*[3]

He claims that there are two kinds of *periculum in mora*, which are fundamentally different from each other: the danger of "practical unfruitfulness" (*infruttuosità pratica*) and the danger of "lateness" (*tardività)* of the future judgment.

There is a danger of practical unfruitfulness if the plaintiff is facing the danger that the enforcement of a final favourable judgment will be made impossible or substantially more difficult by the defendant's misconduct, most commonly dissipating assets, destroying evidence, etc. In other words, this is the danger that the defendant, pending the proceedings, may dispose of his/her assets or the property in dispute, so as to make impossible or substantially impracticable the execution of a final judgment. The danger of practical unfruitfulness is counteracted by the traditional conservative (interim) measures, like the Ital-

[2] Civil Procedure Reform Act no. 353 of 1990.
[3] *Cadiet & Jeuland* (2011).

ian *sequestro giudiziario* or *sequestro conservativo* or the German *Arrest*, so as to allow the claimant to preserve the defendant's assets or the property in dispute.

There is a danger of lateness if the plaintiff may suffer an harm arising from the circumstance that his/her right is simply unsuitable to wait for satisfaction during the time necessary to obtain a favourable decision. In such cases the danger does not derive from defendant's cynical obstructive tactics frustrating the enforcement of the final judgment, but from the delay in satisfying the claim, due to the duration of the ordinary proceedings. Just think of a maintenance creditor: He/she does need immediately money to survive and may suffer an irreparable damage even if where he/she is not facing the risk that the debtor, by transferring his/her assets makes himself/herself impecunious and the enforcement of the final judgment impossible or substantially more difficult. A second example is that of a company in need of liquidity to avoid insolvency. Maintenance creditors or companies at risk of insolvency cannot be helped by freezing measures aimed at preserving debtors' assets and facilitating the future enforcement of favourable. They need provisional measures with the purpose of giving immediate satisfaction of their claims ("anticipatory" provisional measures, *provvedimenti cautelari anticipatori*).

This clarification may appear quite obvious nowadays, if you consider e.g. the German *Leistungs- or Befriedigungsverfügungen* or the French *référé*. But *Calamandrei* wrote in *Anno Domini* 1936! Thirty-one years before Fritz Baur[4] and thirty-five years before Dieter Leipold[5]. Moreover, *Calamandrei* claims that the purpose of provisional measures, i.e. counteracting the danger of suffering (during the time necessary to obtain a favourable decision at the end of ordinary proceedings) an harm unsuitable of adequate recovery, often requires provisional measures to give immediate satisfaction to the plaintiff's rights or at least to adopt a provisional regulation (*Regelungsverfügung* in German terminology).

Please note: according to *Calamandrei* and the following Italian scholarship such kinds of provisional measures are no exception to the purely conservative measures, which allegedly should build the normal case. As already mentioned, there are two kinds of *periculum in mora*, which are different from each other in nature, but equal in systematic role. In my eyes this remark amounts to a sort of Italian advantage in the general theory of provisional measures in comparison with other legal cultures. In this field, in the Italian legal system, there is no *Vorwegnahmeverbot.*

5. This remark may also accounts for the fundamental role of provisional measures in the Italian civil justice system.

[4] *F. Baur*, Studien zum einstweiligen Rechtsschutz, Tübingen, 1967.

[5] *D. Leipold*, Grundlagen des einstweiligen Rechtsschutzes im zivil-, verfassungs- und verwaltungsgerichtlichen Verfahren, München, 1971.

It has become almost commonplace in the last decades to observe that the Italian system of civil justice is inefficient and unable to ensure effective judicial protection of rights.

This might be true only with regard to the average length of ordinary civil proceedings, which normally are in the focus of statistics collected by international organisations.

As an example, consider the EU Justice Scoreboard, published yearly (since 2013) by the European Commission.[6] According to its presentation, "the EU Justice Scoreboard is an information tool aiming to assist the EU and Member States to achieve more effective justice by providing objective, reliable and comparable data on the quality, independence and efficiency of justice systems in all Member States".

As to the efficiency of justice systems, the EU Justice Scoreboard uses three indicators: length of proceedings, clearance rate and number of pending cases. The length of proceedings expresses the time (in days) taken by the court to reach a decision at first instance in the ordinary proceedings. According to the European Commission, "the efficiency of a judicial system should already be reflected at first instance, as the first instance is an obligatory step for everyone going to court".

First instance of the ordinary proceedings as "an obligatory step for everyone going to court"? As far as the civil procedure in Italy is concerned, one should take this remark *cum grano salis*, very cautiously. Ordinary proceedings are not the key instrument for ensuring judicial protection of rights in Italy anymore. In fact, over the last decades, they are becoming less and less important, even residual, to that end.

In order to take a correct view of the real states of affairs in Italy, you should take into consideration a large number of "special" proceedings, which normally enable claimants to get effective and efficient judicial protection of rights in a wide range of situations.

As of 2012, the ratio of special to ordinary proceedings before the *tribunali*, general courts in first instance, reads as follows. Ordinary proceedings: incoming cases, 401.528; disposed cases, 447.598; pending cases on 31 December 2012, 1.247.440. Special proceedings: incoming cases, 856.790; disposed cases, 739.129; pending cases on 31 December 2012, 248.541. The number of cases brought into the courts by way of special proceedings was more than the double of the number of incoming ordinary proceedings in 2012. The number of pending special proceedings was about one fifth of the number of pending ordinary proceedings on 31 December 2012.

[6] The Scoreboard uses different sources of information. Most of the quantitative data are currently provided by the Council of Europe Commission for the Evaluation of the Efficiency of Justice (CEPEJ). For the 2014 Scoreboard, the Commission has also drawn upon additional sources of information, namely, Eurostat, World Bank, World Economic Forum, and the European judicial networks.

If one has a look into the variety of special proceedings, a prominent role is played by the summary proceedings heading to provisional measures (and by those heading to orders for payment, *procedimento di ingiunzione*, Arts. 633-656 c.p.c.).

6. A concluding remark. The "Introduzione sistematica allo studio dei provvedimenti cautelari" gives an excellent theoretical basis to conceive provisional remedies as a means to achieve a fundamental goal of any developed legal system, i.e. the effectiveness of judicial protection of rights, which is required by Art. 47 of the EU Charter of Fundamental Rights.[7]

The link between provisional relief and effectiveness of judicial protection of right has been acknowledged by the European Court of Justice in the famous *Factortame* decision, where it ruled that national provision of civil procedure which bar the grant of interim remedies have to be disregarded by national court in so far as it is necessary to secure judicial relief to rights rooted in the Treaties or in EC primary legislation.[8]

Interesting enough, this decision was preceded by the conclusions delivered by the Italian Advocate General Giuseppe Tesauro. His conclusions show very well the link between effectiveness of judicial protection of rights and provisional measures with extensive quotations of *Giuseppe Chiovenda*'s "Istituzioni di diritto processuale civile" and *Piero Calamandrei'*s "Introduzione". Giuseppe Tesauro did much more than just this. As he told me in a talk, Tesauro brought from Italy to Luxembourg a copy of *Calamandrei*'s book, let translate in English wide passages of it by the translation service of the Court and put the pieces of translation on the desk of each and every judge of the Court.

I think this move was an important step in order to achieve the outcome we all know.

[7] "Everyone whose rights and freedoms guaranteed by the law of the Union are violated has the right to an *effective remedy* before a tribunal".

[8] C-213/89 Factortame.